A

AKITEK TIMOR

v.

TAI KIAN CHEONG

B

FEDERAL COURT, PUTRAJAYA
ZULKEFLI MAKINUDIN CJ (MALAYA)
ABDULL HAMID EMBONG FCJ
AHMAD MAAROF FCJ
ZALEHA ZAHARI FCJ
C SULONG MATJERAIE FCJ
[CIVIL APPEALS NO: 02-1-01-2012(W) & W-02-42-2001]
14 NOVEMBER 2013

D ***CIVIL PROCEDURE:*** *Summary judgment - Order of - Summary judgment order for damages by Senior Assistant Registrar - Whether Court of Appeal erred in treating order of SAR as nullity - Whether SAR had jurisdiction to make order pursuant to O. 14 r. 3 Rules of the High Court 1980 - Whether decision of Court of Appeal set aside*

E ***CIVIL PROCEDURE:*** *Appeal - Appeal to Federal Court - Court of Appeal questioned validity of Senior Assistant Registrar's order on its own motion - SAR's order had been dealt with by High Court Judge - Whether Court of Appeal right in treating order granted by SAR as nullity - Whether decision to dismiss appeal by Court of Appeal was*
F *correct*

The appellant was appointed by the respondent to provide architectural services for the Proposed Bachang Hotel Project ('the project'). Upon the instructions of the respondent, the appellant had prepared the working drawings for building plan approval. The
G respondent, however, abandoned the project and as at the date of abandonment, the respondent had only paid the appellant RM16,000. The appellant contended that it was entitled to be paid a fee according to the Pertubuhan Akitek Malaysia Scale of Professional Charges. The appellant instituted proceedings against
H the respondent for the sum of RM567,576.50. The appellant then applied for summary judgment pursuant to O. 14 of the Rules of the High Court 1980 against the defendants (respondent being the fourth defendant at the material time). The Senior Assistant Registrar ('SAR Rajendran') heard the O. 14 application and held
I that an interlocutory judgment be entered against the defendants and a date to be fixed for assessment of damages ('SAR Rajendran's order'). The defendants appealed against the said

order ('the O. 14 appeal'). The High Court allowed the appeal by the other defendants but dismissed the appeal by the respondent as the contracting party with the architect. The High Court Judge ordered that a date be fixed for the assessment of the amount due to the appellant. Subsequently, the Deputy Registrar quantified the amount payable by the respondent to the appellant to be in the sum of RM405,967 ('the DR's order'). The respondent lodged an appeal against the DR's order ('the assessment appeal'). The High Court Judge hearing the assessment appeal allowed the respondent's appeal and set aside the DR's order. The appellant appealed to the Court of Appeal against the said decision. The Court of Appeal, on its own motion, questioned the validity of the earlier decision of SAR Rajendran who heard the appellant's application for summary judgment and dismissed the appellant's appeal. Leave to appeal to the Federal Court was then granted to the appellant on the question as to whether the Court of Appeal was wrong to treat the order for summary judgment for damages made by SAR Rajendran and all consequential orders thereafter as nullity and to have dismissed the appeal on that basis.

Held (allowing appeal with costs)
Per Zaleha Zahari FCJ delivering the judgment of the court:

(1) It was not open for the Court of Appeal to question SAR Rajendran's order as being a nullity on its own motion. During the period of 19 years (22 September 1989 to 8 April 2009) since the issuance of the order, none of the parties had questioned the validity of SAR Rajendran's order. In view of the fact that SAR Rajendran's order had been the subject matter of an appeal before the High Court Judge, the order of the High Court Judge who heard the O. 14 appeal was the effective order in respect of the O. 14 application. The order of the High Court Judge in respect of the O. 14 appeal was not for "assessment of damages" but instead "quantification of the amount due to the appellant". (para 25)

(2) The appellant's claim, pursuant to a contract which incorporated the Pertubuhan Akitek Malaysia Scale of Professional Charges (which included a formula as to an architect's entitlement of fees on the abandonment of a project), being analogous to a claim for liquidated and ascertained damages, could be the subject of an application for summary judgment. SAR Rajendran, in hearing the O. 14

application, had the jurisdiction to make the order which he did pursuant to O. 14 r. 3, to give interlocutory judgment on liability, but the quantum, as to the application of the prescribed formula, to be assessed. (para 26)

(3) The Court of Appeal erred in ruling SAR Rajendran's order to be a nullity, striking out the appellant's appeal and making the consequential orders which it did. Thus, the answer to the question of law posed was accordingly in the affirmative. Hence, the decision of the Court of Appeal was set aside. (paras 27 & 28)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah dilantik oleh responden untuk menyediakan perkhidmatan senibina untuk Cadangan Projek Hotel Bachang ("projek"). Atas arahan responden, perayu telah menyiapkan lukisan kerja untuk kelulusan pelan bangunan. Responden, walau bagaimanapun, telah meninggalkan projek itu dan pada tarikh projek itu dihentikan, responden hanya telah membayar perayu RM16,000. Perayu berhujah bahawa ia berhak dibayar amaun menurut Skala Caj Profesional Pertubuhan Akitek Malaysia. Perayu memulakan prosiding terhadap responden untuk amaun RM567,576.50. Perayu kemudiannya memohon penghakiman terus di bawah A. 14 Kaedah-Kaedah Mahkamah Tinggi 1980 terhadap defendan-defendan (responden adalah defendan keempat pada masa itu). Penolong Kanan Pendaftar ('PKP Rajendran') telah mendengar permohonan A. 14 dan memutuskan satu penghakiman interlokutori dimasukkan terhadap defendan-defendan dan penetapan tarikh taksiran ganti rugi ('perintah PKP Rajendran'). Defendan-defendan merayu terhadap perintah tersebut ('rayuan A. 14'). Mahkamah Tinggi membenarkan rayuan oleh defendan-defendan lain tetapi menolak rayuan oleh responden sebagai pihak yang memasuki kontrak dengan akitek. Hakim Mahkamah Tinggi membuat perintah untuk penetapan tarikh pentaksiran jumlah yang terhutang. Kemudian, Timbalan Pendaftar menetapkan bahawa jumlah yang perlu dibayar oleh responden adalah sebanyak RM405,967 ('perintah TP'). Responden merayu terhadap perintah TP ('rayuan pentaksiran'). Hakim Mahkamah Tinggi yang mendengar rayuan pentaksiran telah membenarkan rayuan responden dan mengenepikan perintah TP. Perayu merayu ke Mahkamah Rayuan terhadap keputusan tersebut. Mahkamah Rayuan, atas usulnya sendiri, mempersoalkan kesahihan keputusan PKP Rajendran sebelum ini yang telah mendengar permohonan

penghakiman terus perayu dan seterusnya menolak rayuan perayu. Kebenaran untuk merayu ke Mahkamah Persekutuan telah dibenarkan kepada perayu atas persoalan sama ada Mahkamah Rayuan terkhilaf apabila menganggap perintah penghakiman terus untuk ganti rugi yang dibuat oleh PKP Rajendran adalah tidak sah dan membatalkan segala perintah berbangkit selepas itu dan atas dasar itu telah pun menolak rayuan.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Zaleha Zahari HMP menyampaikan penghakiman mahkamah:

(1) Ia tidak terbuka kepada Mahkamah Rayuan untuk mempersoalkan kesahihan perintah PKP Rajendran atas usulnya sendiri. Sepanjang tempoh 19 tahun (22 September 1989 sehingga 8 April 2009) sejak pengeluaran perintah, tiada pihak yang mempersoalkan kesahihan perintah PKP Rajendran. Memandangkan perintah PKP Rajendran telah menjadi hal perkara rayuan di hadapan Hakim Mahkamah Tinggi, perintah Hakim Mahkamah Tinggi yang mendengar rayuan A. 14 adalah perintah yang efektif berkenaan permohonan A. 14. Perintah Hakim Mahkamah Tinggi berkenaan rayuan A. 14 bukan untuk "taksiran ganti rugi" tetapi untuk "pengiraan jumlah yang terhutang kepada perayu."

(2) Permohonan perayu, menurut suatu kontrak yang memasukkan Skala Caj Profesional Pertubuhan Akitek Malaysia (yang termasuk formula untuk kelayakan seorang arkitek mendapatkan fi apabila projek dihentikan), adalah seakan-akan serupa dengan permohonan untuk ganti rugi jumlah tertentu dan ditentukan, boleh menjadi hal perkara bagi permohonan penghakiman terus. PKP Rajendran dalam mendengar permohonan A. 14 mempunyai bidang kuasa untuk membuat perintah seperti yang dibuatnya di bawah A. 14 k. 3, untuk memberikan penghakiman interlokutori berkenaan liabiliti, tetapi kuantum, mengenai penggunaan formula yang ditetapkan, harus ditaksirkan.

(3) Mahkamah Rayuan terkhilaf dalam memutuskan bahawa perintah PKP Rajendran adalah tidak sah, membatalkan rayuan perayu dan membuat perintah berbangkit yang dibuatnya. Dengan itu, persoalan undang-undang yang ditimbulkan sewajarnya dijawab secara afirmatif. Maka, keputusan Mahkamah Rayuan diketepikan.

Legislation referred to:
Rules of the High Court 1980, O. 2 rr. 1, 2(1), O. 14 rr. 1(2), 3

For the appellant - WSW Davidson (Esther Chow Ruen Xin with him); M/s Azman Davidson & Co
For the respondent - Ng Aik Beng; M/s AB Ng & Partners

[Editor's note: For the Court of Appeal judgment, please see Akitek Timor v. Tai Kian Cheong [2011] 1 LNS 1739]

Reported by Suhainah Wahiduddin

JUDGMENT

Zaleha Zahari FCJ:

[1] The issue for determination in this appeal is whether the Court of Appeal was, in the circumstances of this case, right, when, on its own motion, at the hearing of the appellant's appeal against the decision of the High Court as to the amount of fees assessed and awarded to the appellant for work done, in questioning the validity of the earlier decision of the Senior Assistant Registrar who heard the appellant's application for summary judgment. We heard this appeal on 31 May 2012 wherein we allowed the appeal with costs. The decision of the Court of Appeal was set aside and the case remitted back to the Court of Appeal to hear the appellant's appeal on its merits. We now give the reasons for our decision.

[2] The question of law posed to us for determination in this appeal was this:

> Whether the Court of Appeal in all the circumstances of this case were wrong to treat the order for summary judgment for damages made by SAR Rajendran on 22.9.89 and all consequential orders thereafter as a nullity and to have dismissed the appeal on that basis.

Background

[3] Akitek Timor (the plaintiff in the High Court and appellant in this appeal) was appointed by Tai Kian Cheong trading as Tai Kian Cheong & Co (the fourth defendant in the High Court and respondent in this appeal) to provide architectural services of a project known as "Proposed Bachang Hotel Project" ('the project') on terms specified in the appellant's letter dated 3 May 1974 which incorporated the "Pertubuhan Akitek Malaysia Scale of

Professional Charges". The offer was accepted by the appellant by its letter dated 10 June 1974. A collateral agreement was subsequently signed between them as set out in a letter dated 17 May 1974.

[4] The appellant's case was that it had prepared the Feasibility Study Report, sketch plans and building layout plans and had duly submitted these documents to Majlis Perbadanan Melaka Tengah (MPMT) for approval sometime in August 1974. Planning approval was obtained from MPMT on 7 July 1975 subject to the incorporation of certain technical requirements.

[5] Upon the instructions of the respondent, sometime in 1976, the appellant prepared the working drawings for building plan approval. The appellant's case was that it had prepared the working drawings which incorporated the technical requirements required by MPMT. The drawings prepared were then submitted to MPMT for building plan approval. The final building plan was approved by MPMT subject to compliance with two conditions. The respondent had complied with both of these conditions.

[6] The respondent however abandoned the project in 1983. As at the date of abandonment of the project, the respondent had only paid the appellant RM16,000. The appellant contended that it was entitled to be paid a fee according to the Pertubuhan Akitek Malaysia Scale of Professional Charges, ie, 7 1/2% of the value of works executed, and 2/3rd of the fees that would have had to be paid for work that was included in the tender and subsequently omitted.

[7] On 16 April 1987 the appellant instituted proceedings against the respondent and three others for the fees it claimed it was entitled to. The appellant quantified the fee payable to it to be in the sum of RM567,576.50. The appellant then, on 28 October 1987, applied for summary judgment pursuant to O. 14 of the Rules of the High Court 1980 ('the 1980 Rules') to be entered against all of the defendants in the sum claimed.

[8] The Senior Assistant Registrar, Mr N Rajendran (SAR Rajendran) heard the O. 14 application on 22 September 1989 and his decision was as follows, "that interlocutory judgment be entered against the defendants and a date be fixed for assessment of damages" ('SAR Rajendran's order'). The defendants appealed to the judge-in-chambers against SAR Rajendran's order ('the O. 14 appeal').

[9] The O. 14 appeal against SAR Rajendran's order was heard by NH Chan J on 6 August 1990 whose findings was as follows:

> For the reasons which are apparent during the course of argument, I have indicated that the first three defendants ought to succeed on the ground that probably no contract has been established against them. At any rate, it is an issue which should be tried.
>
> However it is also apparent from the reasons which I have also indicated during the course of argument that the fourth defendant is the contracting party with the architect.
>
> In the result I would allow the appeal by the first three defendants with costs here and in the court below. Leave to defend to these defendants.
>
> As for the appeal by the fourth defendant, it is dismissed with costs.

The order extracted of the High Court Judge decision in respect of the O. 14 appeal included the following, "that a date be fixed for the assessment of the amount due to the plaintiff". The record shows that the fourth defendant (ie, respondent in this appeal) did not appeal to the Court of Appeal against this decision of NH Chan J.

[10] During the period 5 May 1997 to 16 March 1999, the appellant and the respondent proceeded with the hearing of "the assessment of the amount due to the plaintiff". Based on the evidence adduced by parties, the Deputy Registrar, Tengku Maimun binti Tuan Mat, (as she then was), on 19 October 1999, quantified the amount payable by the respondent to the appellant to be in the sum RM405,967 together with interest at 3% p.a. from 1 January 1983 to 22 September 1989, and thereafter, at 8% p.a. until full payment together with costs ('the DR's order'). The respondent lodged an appeal to the judge in chambers against the DR's order ("the assessment appeal").

[11] A different High Court Judge heard the assessment appeal. On 14 December 2000 the High Court Judge hearing the assessment appeal allowed the respondent's appeal with costs. The DR's order dated 19 October 1999 was set aside. The amount the respondent was directed to pay the appellant was

reduced from RM405,967 to RM5,000. The notes of proceedings recorded by the learned High Court Judge on 10 November 2000 are reproduced for ease of reference:

> Saya bersetuju dengan Peguam Defendan Keempat bahawa Kaedah-Kaedah Architects (Scale of Minimum Fees) Rules 1986 yang bertarikh 02.10.1986 tidak boleh dipakai di dalam kes semasa di mana Agreement antara Plaintif/Defendan Keempat dibuat sebelum itu iaitu 03.05.1974 di mana Defendan Keempat bersetuju untuk membayar RM5,000.00 sahaja untuk kesemua pelan yang disediakan dan dikemukakan kepada Kerajaan. Tidak ada apa-apa lain yang telah dikemukakan untuk menunjukan apa-apa lagi yang telah dibuat oleh Plaintiff selain daripada mengemukakan pelan-pelan tersebut P9 kepada Kerajaan. Oleh itu Plaintif hanya berhak kepada RM5,000.00 sahaja. Kaedah-kaedah tersebut masih belum wujud lagi. Sebenarnya inilah apa yang telah berlaku. Mahkamah telah melihat ekshibit "P9" iaitu pelan-pelan berkenaan yang merupakan 14 keping kertas pelan sahaja. Saya tidak dapat menerima hujahan Peguam Plaintif bahawa Plaintif berhak kepada tuntutan sebanyak RM405,967.00 hanya untuk menyediakan pelan-pelan tersebut. Tidak ada apa-apa lain yang telah dikemukakan untuk menunjukkan apa-apa lagi yang telah dibuat oleh Plaintif selain daripada mengemukakan pelan-pelan tersebut (P9) kepada Kerajaan.

[12] The appellant appealed to the Court of Appeal against this decision of the High Court Judge dated 14 December 2000.

[13] At the date of hearing of the appellant's appeal against the High Court Judge's decision dated 14 December 2000 (ie, on 6 April 2009) the Court of Appeal directed parties to submit on the following issue, "Whether the SAR's order dated 22 September 1989 was valid? After hearing the submissions of parties on this issue, on 8 April 2009, the Court of Appeal decision was as follows: (a) the appellant's appeal be dismissed and costs be costs in the cause; (b) the orders of the Senior Assistant Registrar, Deputy Registrar and High Court Judge dated 22 September 1989, 6 August 1990, 19 October 1999 and 14 October 2000 were nullities and accordingly struck out; and (c) the case is sent back to the High Court for full trial.

[14] The Court of Appeal's reasoning in arriving at the decision which they did was as follows:

> We are of the view that as the claim of the appellant/plaintiff is for a liquidated sum of RM567,576.50, being a claim for professional fees, and there is no prayer for assessment of

damages by the Registrar, the Senior Assistant Registrar hearing the Order 14 summary judgment application had no power to make an order for damages to be assessed by a Registrar. The only options available to the learned Senior Assistant Registrar are either to dismiss the Order 14 application or to award the fixed sum of RM567,576.50 as prayed for; or to award a lesser sum that she found to have been proved. As she had instead ordered that damages be assessed, we are of the opinion that the Order that she made was highly irregular and a nullity.

[15] Leave to appeal to the Federal Court was then granted to the appellant to appeal on the question of law as earlier stated in this judgment.

The Submissions

The Appellant's Submissions

[16] Dato' Davidson, counsel for the appellant, stressed the following facts: that it was incumbent upon a defendant to raise any irregularity before taking any further step in the proceedings (O. 2 r. 2(1)); the fact that the validity of SAR Rajendran's order was raised by the Court of Appeal on 6 April 2009 on its own motion, not at the instance of any party to the action; the fact that in all subsequent proceedings before the High Court the validity of SAR Rajendran's order was never questioned as being a nullity; the fact that the quantification of the fees payable by the respondent to the appellant for professional services rendered pursuant to the formula in the architect's scale of professional fees had been fought on its merits.

[17] He stressed the fact that, during the period of 19 years since the issuance SAR Rajendran's order, all parties had accepted SAR Rajendran's order to be valid, ie, when the case was heard by the High Court Judge who heard the O. 14 appeal; when the case proceeded for assessment before the Deputy Registrar; thereafter, before the High Court Judge who heard the assessment appeal.

[18] Dato' Davidson submitted the distinction between irregularities and nullities ceased to exist with the coming into force of the 1980 Rules. Acts and omissions that amount to non-compliance with one or more of the rules of court result in their being curable irregularities, not nullities. Order 2 r. 1 of the 1980 Rules provides that any failure to comply with a requirement of the rules "shall be treated as an irregularity and shall not nullify the proceedings,

any step taken in the proceedings, or any document judgment, or order therein." O. 2 r. 2(1) then provides that "any application to set aside for irregularity ... shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity".

[19] There is no jurisdictional bar to any claim for summary judgment except for those type of actions listed in O. 14 r. 1(2). Claims of all sorts have been the subject matter of summary judgment applications, including claims for *quantum meruit* and unliquidated damages. Courts are empowered to 'give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or the relief claimed.' The appellant's claim, pursuant to a contract which incorporated the Pertubuhan Akitek Malaysia Scale of Professional charges (which included a formula as to an architect's entitlement to fees on the abandonment of a project), was analogous to a claim for liquidated and ascertained damages, and can certainly be the subject of an application for summary judgment.

[20] Dato' Davidson submitted SAR Rajendran hearing the O. 14 summary judgment application clearly had jurisdiction to make the order which he did pursuant to O. 14 r. 3, ie, to give interlocutory judgment on liability, but the quantum, as to the application of the prescribed formula, to be assessed. The only irregularity (if any), was for SAR Rajendran to refer to the quantification exercise as "damages to be assessed". The error, if at all, was but an error of description, which could have been corrected by the Court of Appeal by way of an amendment to SAR Rajendran's order. To rule SAR Rajendran's order and all subsequent orders to be nullities was prejudicial to the appellant as it would put the appellant back to square one with the evidential difficulties which arises from the long lapse of time.

[21] The Court of Appeal accordingly erred in treating the SAR Rajendran's order as a nullity, in striking out SAR Rajendran's order and in making the consequential orders which it did.

The Respondent's Submissions

[22] The respondent's counsel, Mr Ng Aik Beng, supported the reasoning given by the Court of Appeal in arriving at the decision which it did, ie, by reason of the absence of an express prayer in the statement of claim for "damages to be assessed". The order

made by SAR Rajendran could not come within the ambit of the general prayer sought by the appellant of "other relief the court deems fit". SAR Rajendran accordingly erred in making an order which had been not prayed for in the statement of claim.

[23] In the circumstances of this case SAR Rajendran could only make one of the following orders - either allow the O. 14 application and give judgment in the amount prayed for; alternatively, give judgment for such lesser amount found proven. The fact that the court failed to fix a specified sum in this summary judgment application constitutes an issue to be tried. The court was to bear in mind the fact that the suit against the other three defendants was still pending before the High Court.

[24] On the lapse of time of a period of 19 years (22 September 1989 to 8 April 2009) before SAR Rajendran's order was questioned as being a nullity by the Court of Appeal on its own motion, he submitted that the Court of Appeal was entitled to do so as an appeal was by way of re-hearing. An order which was a nullity cannot be rectified. The Court of Appeal was right in not hearing the appeal on its merits and in making the orders which it did and in directing for the matter to go for trial.

Decision

[25] On the procedural point, the Court of Appeal questioning SAR Rejendran's order as being a nullity on its own motion we are of the following view. We are of the view that on the facts and circumstances of this case it was not open for the Court of Appeal do so as during the period of 19 years (22 September 1989 to 8 April 2009) since the issuance of the order none of the parties had questioned the validity of SAR Rajendran's order. In any event, in view of the fact that SAR Rajendran's order had been the subject matter of an appeal before the High Court Judge, the order of the High Court Judge who heard the O. 14 appeal was the effective order in respect of the O. 14 application. It is to be noted that the order of the High Court Judge in respect of the O. 14 appeal was not for "assessment of damages" but instead "quantification of the amount due to the appellant".

[26] We are in agreement with the appellant's counsel that the appellant's claim pursuant to a contract which incorporated the Pertubuhan Akitek Malaysia Scale of Professional charges (which included a formula as to an architect's entitlement to fees on the abandonment of a project) being analogous to a claim for

liquidated and ascertained damages, can be the subject of an application for summary judgment. We are also in agreement with the appellant counsel that SAR Rajendran hearing the O. 14 application had jurisdiction to make the order which he did pursuant to O. 14 r. 3, to give interlocutory judgment on liability, but the quantum, as to the application of the prescribed formula, to be assessed.

[27] For the above reasons it is our finding that the Court of Appeal erred in ruling SAR Rajendran's order to be a nullity, in striking out the appellant's appeal and in making the consequential orders which it did.

[28] Our answer to the question of law posed was accordingly in the affirmative.

[29] The appeal was accordingly allowed with costs. The decision of the Court of Appeal dated 8 April 2009 was set aside and the case remitted back to the Court of Appeal to hear the appellant's appeal on its merits. The deposit to appellant.